

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re D.J. et al., Persons Coming Under the
Juvenile Court Law.

ALAMEDA COUNTY SOCIAL
SERVICES AGENCY,

Plaintiff and Respondent,

v.

O.J.,

Defendant and Appellant.

A147348

(Alameda County
Super. Ct. Nos. OJ11-017812 &
OJ11-017811)

O.J. (Father) is the father of twins D.J. (male twin) and D.J. (female twin). He argues that the juvenile court erred in denying his Welfare and Institutions Code¹ section 388 petition seeking placement for the twins with him in Louisiana. The court found Father failed to present a prima facie case that circumstances had changed such that placing the children with him would be in the twins' best interests. We affirm.

¹ Statutory references are to the Welfare and Institutions Code unless otherwise noted.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Initial Detention and Juvenile Court Proceedings

The twins were born in October 2005. The twins and their two older half sisters were placed in protective custody in 2011 after the two older siblings ran away and disclosed that the children were left unattended for days at a time with no food.

On October 20, 2011, the Alameda County Social Services Agency (Agency) filed a petition regarding the then five-year-old twins and their two older siblings pursuant to section 300, subdivision (b). The petition alleged that their mother K.S. (Mother) had been homeless since July 2011 and had been unable to meet the basic needs of her children. Reportedly, she had lived in multiple hotels with the children and their stepfather. The children were left unsupervised at times and lacked adequate food. The children had not attended school since September 25, 2011, due to Mother's unstable homeless lifestyle. The family had also been living in the three-bedroom home of the paternal stepgrandmother, which was overcrowded with five adults and the four children. The paternal stepgrandmother yelled at the children and the stepfather smoked marijuana in their presence.

Mother indicated that she was never married to Father, but that his name was on the twins' birth certificates. Father periodically gave her financial support but she had never lived with him. Reportedly, he had attempted to contact the social worker, but when she called him back he did not answer. He appeared to be living in Louisiana. The juvenile court ordered the children detained.

On November 9, 2011, the juvenile court held the jurisdiction/disposition hearing. The court ordered the children removed from Mother's custody and ordered the Agency to provide reunification services to her. Reunification services were not ordered for Father as he remained an alleged father.

On December 7, 2011, Father was appointed counsel. The social worker had contacted the twins' paternal grandmother and discussed potential relative placements.

The paternal grandmother agreed to discuss placement options with Father. The social worker was unable to reach Father by telephone and sent a letter requesting he contact her regarding relative placement options, including the possibility of being assessed for placement himself.

The Agency prepared a report for the six-month status review hearing. The Agency recommended that the children remain in out-of-home placement and that Mother continue to receive family reunification services. The social worker still had not been successful in making contact with Father. However, the paternal grandmother indicated that she wanted to be considered for placement if reunification efforts failed with Mother. At the six-month status review hearing, Father was raised to presumed status and the Agency was ordered to provide family reunification services to him.

At the contested 12-month review hearing on February 4, 2013, the juvenile court continued reunification services for Mother to the 18-month permanency hearing date. The children had been placed in a new foster home. The twins were doing well in this placement; however, the foster parents were unwilling at that time to become legal guardians. Father had some contact with the social worker. He reported that he did not have a steady address and requested that the Agency use his mother's home as his mailing address. He did not inquire about his children and indicated he was not in a position to care for them.

II. Mother Regains Custody Under Family Maintenance Services

The Agency prepared a status review report for the 24-month hearing date, recommending that the twins remain dependents but be returned to Mother under family maintenance. Mother was currently residing in a four-bedroom apartment, working at Wal-Mart, and participating in individual and family therapy. She was only minimally participating in outpatient substance abuse treatment. Over the last several months, the amount of visitation had increased and the twins had overnight unsupervised visits in Mother's home. The twins reported that they enjoyed the increased time with Mother

and wanted to return to her care. Their foster parent reported that they had made significant progress, but that the male twin's behavioral issues increased as visitation with Mother increased.

On October 15, 2013, the juvenile court ordered the children returned to Mother's care and ordered family maintenance services for her.

The Agency prepared a status review report for the April 8, 2014 family maintenance review hearing. The social worker reported that a formal search was completed for Father and revealed his last known address was in Jackson, Louisiana. She had attempted to contact him at the number provided by the paternal grandmother; however, he did not return voicemail messages. The report noted that the twins sometimes had contact with Father by phone. Mother had lost her housing and was having trouble finding new housing. She was also having trouble transporting her children to school and had not been transparent with the Agency. She was in partial compliance with her case plan objectives and not in compliance with her case plan activities. The Agency recommended that the children remain in Mother's care.

The Agency prepared a report for the June 17, 2014 review hearing date. The report noted some improvements in the children's school attendance and in Mother's case plan compliance. The Agency again recommended that the children remain in Mother's care under family maintenance. The juvenile court adopted the Agency's recommended findings and orders.

In reports prepared for review hearing dates on September 23, 2014, and March 3, 2015, the Agency continued to recommend that the dependency be continued and that family maintenance services be provided to Mother. A CASA report stated that as of February 20, 2015, the family was living in San Francisco with Mother's sister. Mother stated that Father was not involved in the twins' lives. In December both children spent one day with Father when he unexpectedly came to California and was able to see them.

Other than the unexpected visit, Father had not been present in their lives for the last six to seven years.

III. The Children Are Detained a Second Time

On March 10, 2015, the twins and one of their older sisters were brought into protective custody due to continued neglect by Mother.

On March 12, 2015, a section 387 petition was filed.

On March 26, 2015, the Agency filed a jurisdiction report. Reportedly, Mother had not maintained contact with the Agency since January 2015. The family was again living in a series of hotels, exposing the children to illegal activities. The children had not attended school since February 9, 2015. Mother had failed to address the children's medical and dental needs. She also failed to ensure that the female twin received services for her severe learning disability and speech delay.

On May 12, 2015, the Agency filed a disposition report. The Agency recommended that the children continue to remain dependents and that Mother be offered no further services. Father also would not be offered services.

On June 8, 2015, the juvenile court held the jurisdiction/disposition hearing. Mother did not appear. The court found reasonable services had been provided, and that Mother and Father had made no progress in alleviating or mitigating the causes necessitating out-of-home placement. There was clear and convincing evidence that reunification services should be denied to Mother. The court set a due diligence hearing for July 23, 2015, and a section 366.26 hearing for October 8, 2015.

When informed by a social worker of the due diligence hearing, Father said he wanted to be appointed an attorney to get custody of his children. However, he indicated that the children could not be placed in his care and that he wanted the 75-year-old paternal great-grandfather to be assessed for possible placement. Father was currently living with the paternal grandparents. When asked why he had not responded to previous notices from the Agency, he said "sometimes he was not able to get home to get his

mail.” He also stated that if the twins were going to relocate, he would want to get his own apartment.

IV. Father’s Section 388 Petition

On October 1, 2015, Father filed a request to change court order under section 388, requesting a change to the June 8, 2015 order removing the twins from Mother’s care and placing them in foster care. As evidence of changed circumstance, Father said that he “was made aware of the minors’ removal from their mother and their need for a stable home.” He requested that the twins be placed in his care and custody, claiming this would be better for the children because: “Both reunification and permanence/stability are goals of dependency proceedings and generally considered to be in dependent minors’ best interests. To [Father’s] knowledge neither minor is in a concurrent or otherwise permanent placement. The minors know their father and he is ready, willing, and able to provide permanence for them surrounded and supported by extended family in Louisiana.”

A CASA report filed on October 5, 2015, indicated that the twins had no contact with Mother or Father since their removal. They seemed to be adjusting to their new foster placement.

On November 16, 2015, the Agency filed an interim review report. Father had not been in contact with the social worker during the reporting period. The twins’ caregiver reported that he had called the children one time since they had been placed in her home on March 20, 2015. An Agency status review report indicated that the twins’ older sister reported Father had previously molested her.

The Agency completed an adoption assessment for the twins on November 5, 2015. The Agency determined the twins were adoptable and indicated it would assign them a permanency worker from the adoptions unit.

On November 17, 2015, the juvenile court denied Father’s petition without a hearing. The court found the request did not state new evidence or a change of

circumstances, and that the requested order would not promote the best interests of the children.

On January 19, 2016, Father's notice of appeal was received by the clerk of the superior court. The notice was filed the following day.

DISCUSSION

Father contends the juvenile court abused its discretion by denying his section 388 petition without a hearing. He insists that he had presented a prima facie case of changed circumstances and that it was in the best interest of the twins for him to have custody. We are not persuaded.

Under section 388, subdivision (a), a parent "may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change" a previous court order. "If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held" (§ 388, subd. (d).) Accordingly, to succeed on a section 388 petition a petitioner must make a twofold showing, establishing "that (1) new evidence or changed circumstances exist *and* (2) the proposed change would promote the best interests of the child." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806 (*Zachary G.*), italics added.) To be entitled to a hearing on a section 388 petition a parent must make a prima facie showing on both these elements. (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 432 (*Aljamie D.*).) As to the first element, the parent, to make a prima facie showing, must demonstrate "a *genuine* change of circumstances or new evidence." (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250 (*Anthony W.*), italics added.) The "prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*Zachary G.*, at p. 806.) "In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case." (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189 (*Justice P.*).)

“The juvenile court has discretion whether to provide a hearing on a petition alleging changed circumstances. But in doing so, ‘there are safeguards to prevent arbitrariness in precluding such hearings. Specifically, a petition must be liberally construed in favor of its sufficiency’ ” (*Aljamie D.*, *supra*, 84 Cal.App.4th at p. 431.) A court may deny a hearing only if the petition “ ‘fails to reveal any change of circumstance or new evidence which might require a change of order’ ” (*ibid.*), and/or fails to show the child’s best interests “may be promoted by the proposed change of order” (*Zachary G.*, *supra*, 77 Cal.App.4th at p. 807).

We review a court’s summary denial of a section 388 petition for abuse of discretion. (*Anthony W.*, *supra*, 87 Cal.App.4th at p. 250.) “Broad deference must be shown to the trial judge. The reviewing court should interfere only ‘ “if we find that under all the evidence, viewed most favorably in support of the trial court’s action, no judge could reasonably have made the order that he [or she] did.” ’ ” (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.) “[W]hen two or more inferences can be reasonably deduced from the facts, we may not substitute our decision for the juvenile court’s decision.” (*In re Josiah S.* (2002) 102 Cal.App.4th 403, 419.) “ ‘The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason.’ ” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318–319.)

Here, the lower court did not abuse its discretion by denying Father’s section 388 petition without a full hearing. As to changed circumstances, Father notes that he was found to be the presumed father on April 25, 2012. The juvenile court ordered the Agency to provide family reunification services to him, but a case plan is not in the record on appeal, and it appears Father received no reunification services. Both the section 300 and section 387 petitions contained allegations as to Mother only. From these facts, he argues that he did allege a change in circumstances when he said that he was “ready, willing and able to provide permanence” for his children. Because Father’s

petition does not allege any specific facts to support this statement, the allegation is thin at best.

Even if we were to agree that Father alleged a genuine change in circumstances, he failed to establish that the best interests of the children would be supported by vacating the jurisdictional and dispositional orders. It is clearly established that “ ‘[u]ntil the time the section 366.26 hearing is set, the parent’s interest in reunification is given precedence over a child’s need for stability and permanency.’ [Citation.] ‘Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.’ ” (*In re Zacharia D.* (1993) 6 Cal.4th 435, 447.)

Additionally, “[t]he presumption favoring natural parents by itself does not satisfy the best interests prong of section 388. The cases that state a child may be better off with his or her biological parent rather than with strangers do so when the biological parent has shown a *sustained commitment* to the child and parenting responsibilities.” (*Justice P., supra*, 123 Cal.App.4th 181 at p. 192, italics added.)

Here, a section 366.26 hearing was set and reunification services had terminated. The twins had had only limited contact with Father during their lives and had never lived outside of the San Francisco Bay Area. Even though Father had been aware of the dependency proceedings for several years, he made no effort to become involved in the twins’ lives. Moving them to Louisiana, away from their two older sisters and their mother, was not in their best interest. The siblings reportedly have a strong bond with one another and all of them had stated that they wished to remain connected with one another and live in a stable home. The social worker had opined that it was crucial for the siblings to remain in frequent contact with each other. It was also important for the siblings to have consistent contact/visitation with Mother. The caregivers of the twins’ two older sisters were willing to facilitate regular visitation with the twins. More concerning, the twins’ eldest sibling reported to the social worker that Father had

molested her in the past. An allegation of molest by a sibling is in itself a legitimate reason not to place the twins in Father's care.

Thus, no abuse of the juvenile court's discretion appears in the summary denial of Father's section 388 petition.

DISPOSITION

The order denying Father's section 388 petition without a hearing is affirmed.

DONDERO, J.

We concur:

HUMES, P. J.

BANKE, J.

A147348